

The Hon. Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ESTHER HOFFMAN; SARAH DOUGLASS;  
ANTHONY KIM; and IL KIM and DARIA  
KIM, husband and wife and the marital  
community comprised thereof, on behalf of  
themselves and on behalf of others similarly  
situated,

Plaintiffs,

vs.

TRANSWORLD SYSTEMS INCORPORATED;  
PATENAUE AND FELIX, A.P.C.;  
MATTHEW CHEUNG, and the marital  
community comprised of MATTHEW CHEUNG  
and JANE DOE CHEUNG; National Collegiate  
Student Loan Trust 2004-2; National Collegiate  
Student Loan Trust 2005-2; National Collegiate  
Student Loan Trust 2005-3; National Collegiate  
Student Loan Trust 2006-1; National Collegiate  
Student Loan Trust 2006-3; National Collegiate  
Student Loan Trust 2007-4,

Defendants.

Case No. C18-1132 TSZ

PLAINTIFFS' MOTION FOR  
LEAVE TO MOVE TO STRIKE  
AFFIRMATIVE DEFENSES UNDER  
FED. R. CIV. P. 12(f)(2)

NOTED FOR CONSIDERATION:  
May 7, 2021

**I. RELIEF REQUESTED**

Plaintiffs move for an order to allow the Court to consider Plaintiffs' untimely arguments to strike Defendants' affirmative defenses under Fed. R. Civ. P. 12(f)(2) included in Plaintiffs' Motion to Strike and Dismiss Defendants' Affirmative Defenses. Under Fed. R.

PLAINTIFFS' MOTION FOR LEAVE TO  
MOVE TO STRIKE AFFIRMATIVE  
DEFENSES UNDER FED. R. CIV. P. 12(f)(2) - 1  
(Case No. C18-1132 TSZ)

**Berry & Beckett**  
PLLP

1708 Bellevue Avenue  
Seattle, WA 98122  
(206) 441-5444 FAX (206) 838-6346

Civ. P. 12(f)(2) Plaintiffs were required to file a motion to strike under Fed. R. Civ. P. 12(f) no later than April 12, 2021, absent leave of Court. Plaintiffs are filing a motion for summary judgment pursuant to Fed. R. Civ. P. 56(a) to dismiss certain affirmative defense asserted by Defendants, and request the Court to also consider striking Defendants' 55 affirmative defenses pursuant to Fed. R. Civ. P. 12(f). A copy of Plaintiffs' proposed Fed. R. Civ. P. 56(a) and 12(b)(2) motion is attached as Exhibit 1 to the Declaration of Guy W. Beckett filed with this motion.

## II. RELEVANT FACTS

Each of the Defendants filed their Answers to Plaintiffs' Second Amended Complaint on March 23, 2021. *See* Dkt. No.'s 139, 140, and 141. Plaintiffs are filing a motion for summary judgment dismissal of certain affirmative defenses raised by the Defendants and ask the Court to also consider whether all of Defendants' 55 affirmative defenses should be stricken under Fed. R. Civ. P. 12(f) because they are insufficiently pled.

## III. ARGUMENT

### A. **The Court Should Consider Plaintiffs' Untimely Arguments to Strike Defendants' Affirmative Defenses Under Fed. R. Civ. P. 12(f) Included in Plaintiffs' Motion to Strike and Dismiss Defendants' Affirmative Defenses.**

Fed. R. Civ. P. 12(f) provides as follows:

MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

- (1) on its own; or
- (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

1 Although under Fed. R. Civ. P. 12(f)(2) any motion to strike any of defendants' affirmative  
 2 defenses was required to be filed no later than April 13, 2021, the Court has the discretion to  
 3 allow Plaintiffs to file a motion to strike the affirmative defenses now under Fed. R. Civ. P.  
 4 6(b) and/or Fed. R. Civ. P. 12(f)(1).

5 Rule 6(b) provides that the Court may extend the time for filing a motion after the  
 6 deadline provided by the court rules "if the party failed to act because of excusable neglect."  
 7 Excusable neglect exists here. A draft Motion to Strike Affirmative Defenses was prepared  
 8 and ready to file on April 12, 2021, but due to a miscommunication between Plaintiffs' co-  
 9 counsel attendant to one of counsel's vacations, the motion was not timely filed. *See*  
 10 Declaration of Guy W. Beckett in Support of Plaintiffs' Motion for Leave to Move to Strike  
 11 Affirmative Defenses Under Fed. R. Civ. P. 12(f)(2) ("Beckett Decl.") at 1-2. Under the  
 12 circumstances, the Court should agree that the Plaintiffs' failure to timely file the motion was  
 13 due to excusable neglect and consider Plaintiff's arguments to strike Defendants' 55  
 14 affirmative defenses that are included within Plaintiffs' Motion to Strike and Dismiss  
 15 Defendants' Affirmative Defenses.

16 The Court also has the discretion to consider Plaintiffs' arguments to strike  
 17 Defendants' affirmative defense under Fed. R. Civ. P. 12(f)(1). District courts in the Ninth  
 18 Circuit have permitted plaintiffs to file untimely motions to strike under Rule 12(f)(2) under  
 19 Rule 12(f)(1). For example, in *Taylor v. Stave, Inc.*, No. CV 15-4-190 FMO (ASX), 2016 WL  
 20 6674987 (C.D. Cal. Jan. 4, 2016), the plaintiff filed a Rule 12(f)(2) motion forty-one days  
 21 after the Defendant filed its Answer. The Defendant argued that the motion was untimely and  
 22 should be denied for that reason alone. The Court disagreed, concluding that the benefits  
 23  
 24  
 25  
 26

1 gained from the Court's consideration of the motion outweighed the time issue:

2 Plaintiff filed his Motion 41 days after The Stave filed its Answer.... As  
 3 defendant points out, Federal Rule of Civil Procedure 12(f)(2) states that  
 4 a motion to strike may be made "within 21 days after being served with  
 5 the pleading." .... Defendant's argument fails to acknowledge, however,  
 6 that Rule 12(f)(1) gives the court authority to strike from a pleading "on  
 7 its own." .... It therefore cannot be disputed that "the Court has the  
 8 power to consider the motion and also to strike portions of the pleadings  
 sua sponte. (Citation omitted). Because ***sorting out defendant's***  
***affirmative defenses at this time will streamline the litigation***, the court  
 will consider the merits of the Motion and the sufficiency of defendant's  
 affirmative defenses.

9 *Id.* at \*1-2 (emphasis supplied).

10 Similarly, in *Sprint Sols, Inc. v. Pac. Cellupage, Inc.*, No. 213CV07862CASJCG,  
 11 2014 WL 12610204 (C.D. Cal. Dec. 17, 2014), although the court denied plaintiffs' untimely  
 12 Rule 12(f)(2) motion as moot because the defendants informed the court that they would  
 13 withdraw most of the objectionable defenses, the court ruled that it had the authority to  
 14 consider the motion:  
 15

16 Defendants argue that ... plaintiffs' motion is untimely under Federal  
 17 Rule of Civil Procedure 12(f)(2), which requires that a motion to strike a  
 18 pleading to which a response is not allowed be filed within 21 days of  
 19 service of the pleading. But regardless of whether the motion was timely  
 20 filed, because a district court "may make appropriate orders to strike  
 21 under [Rule 12(f)] at any time on its own initiative," the Court "may  
 22 consider and grant an untimely motion to strike where it seems proper to  
 23 do so." *Campbell v. Pricewaterhouse Coopers, LLP*, No. CIV S-06-2376  
 LKK/GGH, 2007 WL 841694, at \*2 (E.D. Cal. Mar. 20, 2007); *see* 5C  
 Wright & Miller, Federal Practice and Procedure, Civil § 1380 (3d ed.  
 2004) ("The authority given the court by the rule to strike an insufficient  
 defense on its 'own initiative at any time' has been interpreted to allow  
 the district court to consider untimely motions to strike and to grant them  
 if doing so seems proper.").

24 *Id.* at \*2.

1 Consideration of the Plaintiffs' Rule 12(f) arguments included in Plaintiffs' Motion to  
 2 Strike and Dismiss Defendants' Affirmative Defenses will help the Court streamline the  
 3 pleadings and will assist in reducing some of the complexity attendant to this case. Fed. R.  
 4 Civ. P. 1 (civil rules should be "construed, administered, and employed by the court and the  
 5 parties to secure the just, speedy, and inexpensive determination of every action and  
 6 proceeding"). Further, the Court's consideration of these issues will not prejudice Defendants  
 7 as the arguments are included within a motion to which Defendants will already be  
 8 responding. Accordingly, the Court should consider Plaintiffs' untimely Fed. R. Civ. P 12(f)  
 9 arguments contained in Plaintiffs' Motion to Strike and Dismiss Defendants' Affirmative  
 10 Defenses.  
 11

12 A proposed Order is submitted with this motion.

13 DATED: April 27, 2021.

14 ***Attorneys for Plaintiffs:***

15 LEONARD LAW

16  
 17 /s/ Sam Leonard  
 18 Sam Leonard, WSBA #46498  
 19 3614 California Ave. SW, #151  
 20 Seattle, WA 98116  
 21 Telephone: (206) 486-1176  
 22 Facsimile: (206) 458-6028  
 23 E-mail: [sam@seattledebtddefense.com](mailto:sam@seattledebtddefense.com)

24 HENRY & DeGRAAFF, P.S.

25  
 26 /s/ Christina Henry  
 Christina L. Henry, WSBA #31273  
 787 Maynard Ave. S.  
 Seattle, WA 98104  
 Telephone: (206) 330-0595

BERRY & BECKETT, PLLP

/s/ Guy Beckett  
 Guy W. Beckett, WSBA #14939  
 1708 Bellevue Avenue  
 Seattle, WA 98122  
 Telephone: (206) 441-5444  
 Facsimile: (206) 838-6346  
 E-mail: [gbeckett@beckettllp.com](mailto:gbeckett@beckettllp.com)

NORTHWEST CONSUMER LAW CENTER

/s/ Amanda Martin  
 Amanda N. Martin, WSBA #49581  
 936 North 34th Street, Suite 300  
 Seattle, WA 98103  
 Telephone: (206) 805-0989

1 Facsimile: (206) 400-7609  
E-mail: [chenry@HDM-legal.com](mailto:chenry@HDM-legal.com)

Facsimile: (206) 805-1716  
E-mail: [Amanda@NWCLC.org](mailto:Amanda@NWCLC.org)

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
  
PLAINTIFFS' MOTION FOR LEAVE TO  
MOVE TO STRIKE AFFIRMATIVE  
DEFENSES UNDER FED. R. CIV. P. 12(f)(2) - 6  
(Case No. C18-1132 TSZ)

**Berry & Beckett**  
PLLP  
1708 Bellevue Avenue  
Seattle, WA 98122  
(206) 441-5444 FAX (206) 838-6346